Supreme Court, U.S.
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No. 97-1874

In The

Supreme Court of the United States

October Term, 1997

HOLT CARGO SYSTEMS, INC.,

Petitioner,

vs.

BERNARD KEIFER, SR.,

-and-

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BERNARD KEIFER, SR.

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

STATEMENT OF THE CASE

The Petition accurately states the procedural background of the cases.

For purposes of deciding the propriety of review of the Third Circuit Court Order in this matter only, Respondent agrees that the Petition accurately states the factual background of the case.

REASONS FOR DENYING THE WRIT

The petition's factbound claim that the Third Circuit erred as a matter of law in affirming the Benefits Review Board does not warrant review by this Court. The decision below was a plainly correct application of settled law and no conflict among the circuits exists.

1. This Court has determined that Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) contains occupational, not geographical, requirements for coverage under the Longshore and Harbor Workers' Compensation Act and applies where either the claimant's occupation is specifically enumerated in Section 2(3) or because it falls within the general category of "maritime employment". *P.C. Pfeiffer Company, Inc. v. Ford,* 444 U.S. 69 (1979). This Court has further determined that a claimant is covered under the LHWCA if he spends at least some of his time in indisputably covered activities. *Northeast Marine Terminal Company v. Caputo,* 432 U.S. 249 (1977).

The petitioner's position in this case is entirely inconsistent with this Court's discussion of status issues in *Caputo.* There, this Court reviewed Congress' 1972 amendments to the LHWCA and noted that Congress intended to cover persons whose employment was such that they spent at least *some* of their time

in indisputably longshore activities and who, without the 1972 amendments, would be covered for part of their activity. While conceding that the evidence unequivocally establishes that the claimant spent 5% of his activity in covered maritime employment, Holt is essentially requesting that this Court overrule *Caputo's* "some time" test and substitute it with a test that would require a claimant requesting coverage under the LHWCA to demonstrate that a "substantial portion" of his work was maritime in nature. However, the "substantial portion" test has been discredited by the Board and every circuit that has addressed the issue. *Boudloche v. Howard Trucking Company,* 632 F.2d 1346, 1347 (5th Cir. 1980) [a claimant establishes status where two and a half to five percent of his overall work time was spent in maritime activity]; *Atlantic Container Service, Inc. v. Coleman,* 904 F.2d 611 (11th Cir. 1990) [a claimant who spent approximately four to six percent of his employment repairing maritime cargo equipment found to have established status under the LHWCA]; *Graziano v. General Dynamics Corporation,* 663 F.2d 340 (1st Cir. 1981) [a claimant has status under the LHWCA because a regular portion of his overall employment entailed cleaning out acid tanks and steel mill boilers work was indisputably maintenance of shipbuilding equipment]; *Lennon v. Waterford Transport,* 20 F.3d 658 (5th Cir. 1994) [where a majority of claimant's duties were clerical in nature but claimant's duties also required him to sort, pack and handle cargo destined to be loaded on vessels, status was established under the LHWCA].

Although the petition omits mention of the aforecited authorities, its crux is a factbound claim that the Third Circuit misapplied the *Caputo* standard. In fact, the decision below was a plainly correct application of *Caputo* based on the aforecited authorities.

2. Holt urges the Court to grant its petition for the purpose of resolving a conflict between a prior decision of the Third Circuit and its Order in this case as well as for the purpose of resolving a conflict between the decision of the Ninth Circuit and the Third Circuit's Order in this case. However, there is no genuine conflict between the Third Circuit decision and the prior decision of the Third Circuit and the Ninth Circuit.

Holt initially contends that the Third Circuit's Order in this case is inconsistent with its decision in the case of *Sea Land Service v. Rock,* 953 F.2d 56 (3rd Cir. 1992). There, the Third Circuit held that land based activity occurring within the LHWCA's "navigable waters", other than those activities explicitly listed under "maritime employment's" definition in the Act, should be deemed maritime only if it is an integral or essential part of the chain of events leading up to the loading, unloading or building of a vessel. The Third Circuit cited numerous cases with approval where claimants were found to have established status under the LHWCA due to the fact that their work activities had some close nexus to the loading or unloading of cargo from vessels. *See, e.g., Rock, supra*, 953 F.2d at 65; *Harvey Green Company v. Director, OWCP,* 639 F.2d 366 (7th Cir. 1981) [maintenance employee repairing the loading spout and bucket conveyors used to load barges and moving barge hatch covers to make barges available for loading held covered under LHWCA]; *Prolerized New England Company v. Benefits Review Board,* 637 F.2d 30 (1st Cir. 1980) [maintenance employee occasionally operating integrated loading system which polarized metal and facilitates its loading onto ships held covered under LHWCA; claimant also occasionally loaded the ship and repaired loading equipment when it broke down during the loading process], *cert. denied,* 452 U.S. 938 (1981).

Respondent respectfully submits that Holt's contention that the instant matter is inconsistent with *Rock* is without merit.

Petitioner has not requested *en banc* review by the Third Circuit of this case to resolve any intra circuit inconsistency that allegedly exists. Secondly, it is noteworthy that the author of the Third Circuit's Opinion in *Rock* was Circuit Judge Morton I. Greenberg. Judge Greenberg also sat on the panel in this case which voted unanimously to affirm the Board's Order reversing the Administrative Law Judge. If any conflict existed, it is reasonable to assume that Judge Greenberg would have noted same in the form of a concurring or dissenting opinion from the panel's order.

Respondent further submits that Holt's contention that a conflict in the circuits exists between the instant decision and the Ninth Circuit's decision in *Dorris v. Director, OWCP,* 808 F.2d 1362 (9th Cir. 1987) is misplaced. In *Dorris,* the Ninth Circuit held that a claimant/truck driver employed by a consignee who was injured when he slipped and fell while stepping down from the cab of his truck at the dock in Long Beach, California did not meet the status test because truck drivers transporting cargo from a berth at a dock to a berth at a different harbor did not engage in longshore work. *See Dorris, supra*, at 1364-1365. Mr. Keifer respectfully submits that his case raises several important distinctions from *Dorris*. First, Mr. Keifer was actively participating in loading of the cargo from the vessel at the time his injuries were sustained. Moreover, unlike *Dorris*, Mr. Keifer was employed by the company participating in the discharge of the cargo from the vessel. Additionally, irrespective of Mr. Keifer's status at the moment of his injury, there is no factual dispute that a portion of his duties involved transportation of cargo to and from vessels to Holt warehouse facilities where cargo is either delivered or picked up by the eventual consignee of the cargo. Finally, and perhaps most importantly, the claimant in *Dorris* did not have any duties requiring him to participate in activities necessary to maintain the equipment necessary to discharge and load cargo. Accordingly, *Dorris* is distinguishable from the circumstances of this case for the reasons stated above as well

as the reasons stated in *Rock* and the cases cited therein. Accordingly, there is no conflict in the circuits relative to the status issue involved in this case.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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